

11 U.S.C. § 1325(a) (3)
11 U.S.C. § 1325(a) (4)
11 U.S.C. § 1325(a) (6)
Confirmation
Good Faith

IN RE FRANK LEE WHITE

Case # 589-60844-H13

4/23/90 Bankr. D. Or.

Judge Higdon

Mem. Opinion

The court denied confirmation of the debtor's chapter 13 plan under the criteria of § 1325(a) (3), (4) and (6). According to the debtor's testimony, he did not earn enough to fund the plan. Further, the plan would no provide the debtor's major creditor with property which is not less than what she would be paid in a Chapter 7 proceeding. Finally, the court did not believe the plan was proposed in good faith. The evidence indicated that the debtor's business was incorporated after the creditor obtained a judgment against him to attempt to put that asset beyond her reach. Ane he immediately converted his Chapter 7 case to a Chapter 13 cone when the creditor filed her § 523 action against him.

E90-4(8)

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

APR 23 1990

TERENCE H. DUNN, CLERK
BY DEPUTY

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
FRANK LEE WHITE,) Case No. 689-60844-H13
Debtor.) ORDER

The court, having entered its memorandum opinion in the above-entitled proceedings, and based thereon,

IT IS HEREBY ORDERED that the objection by Ms. June Johnson to confirmation of the Chapter 13 plan filed by the debtor, Frank Lee White is sustained; and

IT IS FURTHER ORDERED that confirmation of the Chapter 13 plan of the debtor, Frank Lee White, is denied.

Polly S. Higdon
POLLY S. HIGDON
Bankruptcy Judge

cc: Deb(s); Deb(s) Atty.; Tr.; E. Hill; J. Jagger

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IN RE

FRANK LEE WHITE,

Debtor.

Case No. 689-60844-H13

MEMORANDUM OPINION

Creditor, June Johnson, objects to confirmation of the debtor's chapter 13 plan § 1325(a)(3), (4), and (6).¹ The bases for her allegations under § 1325(a)(3) are that the debtor is attempting to discharge an otherwise nondischargeable debt and he failed to disclose all of his assets in his schedules. She also alleges that the debtor has insufficient income to fund the proposed plan, (a)(6), and that if the debtor's assets were liquidated under Chapter 7, she would receive more than she would receive under the terms of the proposed plan, (a)(4).

Ms. Johnson won a jury award against the debtor in Lane County

¹All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101 et seq., unless otherwise indicated.

1 Circuit Court for \$41,588.69, plus 9% interest, on July 12, 1984.
2 The award included \$10,000 general and \$5,000 punitive damages for
3 intentional infliction of emotional distress; \$15,000 general and
4 \$10,000 punitive damages for assault and battery; \$467.33 for
5 breach of contract; and \$1,121.36 for costs.

6 Debtor originally filed chapter 7 on March 20, 1989,
7 scheduling only two debts: \$5,000 owed on a residence secured by a
8 land sale contract, and \$59,743.96 owed to Ms. Johnson as of the
9 petition date on her unsecured judgment. On May 10, 1989, he
10 amended his schedules to add a \$2,201 unsecured debt to the State
11 of Washington for child support arrearage. On June 22, 1989, Ms.
12 Johnson filed a nondischargeability complaint under § 523(a)(2).
13 The debtor converted his case to Chapter 13 on July 10, 1989 and
14 proposed a three year plan with \$103 per month plan payments.

15 The debtor's schedules reveal no nonexempt personal property.
16 His only scheduled asset of value appears to be a vendee's interest
17 in a land sale contract on which he claims a \$15,000 homestead
18 exemption. The debtor claims to own this property as a tenant by
19 the entirety with his wife from whom he is estranged. His
20 schedules show the full market value of this property to be
21 \$35,000. At trial the debtor testified that it had recently been
22 assessed for property tax purposes at \$41,000. The debtor's wife
23 now resides in the residence and now makes all payments on the land
24 sale contract. She also has been granted relief from the automatic
25 stay to pursue dissolution proceedings against the debtor in state
26 court.

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1 Mr. White is employed as a horse trainer by Frank White
2 Stables, Inc., a corporation that he claims is owned and managed
3 solely by his estranged wife. His proposed plan calls for a
4 payment of approximately 5% to his unsecured creditors, including
5 Ms. Johnson. He testified at the January 23, 1990 trial that he
6 takes home \$110 per week and has done so for as long as he can
7 remember. His 1987 and 1988 tax returns indicate an approximate
8 take home pay of \$140 per week. He said he has not asked for a
9 raise since then and could not explain how he arrived at the \$700
10 per month take-home figure with which he proposes to fund his plan.
11 He also testified that only his wife's funds were used for the down
12 payment on their residence 15 years ago when they were married;
13 that he had no idea how much she paid for the home although he
14 signed the land sale contract; and that she paid all the bills and
15 handled all their finances as he is illiterate.

16 Debtor's scheduled expenses are \$597 per month, including \$285
17 for his own rent. However, he testified that he has moved since
18 filing Chapter 13 and now pays \$150 per month rent. Although he
19 may be saving up to \$135 per month in rent, this is partially
20 offset by an additional \$50 per month expense for classes he is
21 taking to learn to read and write.

22 Ms. Johnson testified that at the time she obtained her
23 judgment against the debtor the stable business was not
24 incorporated and that when she met Mr. White he told her the
25 business was in his name only. He brought her out to Oregon to run
26 the financial side of the business as he could not read or write.

MEMORANDUM OPINION-3

1 He was very knowledgeable about the business, training and showing
2 horses and making buying trips throughout the country as agent for
3 others. He was aware of the finances of the business and answered
4 questions about those finances during the state court trial. He
5 had told her he was living with another woman but that he was not
6 married to her. She did not learn about his wife until the wife
7 confronted her one day at the stable. She testified that she has
8 received no payments on the judgment.

9 The debtor has the burden of establishing good faith when the
10 superdischarge of a potentially nondischargeable debt is sought
11 under § 1328(a). In re Warren, 89 Bankr. 87, 93 (9th Cir. BAP
12 1989). The bankruptcy court should determine a debtor's good faith
13 on a case by case basis, taking into account the particular
14 features of each chapter 13 plan. In re Goeb, 675 F.2d 1386, 1390
15 (9th Cir. 1982). "A bankruptcy court must inquire whether the
16 debtor has misrepresented facts in his plan, unfairly manipulated
17 the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in
18 an inequitable manner." Id. A number of specific factors have
19 been adopted as guidelines for determining good faith:

- 20 1) The amount of the proposed payments and the
amounts of the debtor's surplus;
- 21 2) The debtor's employment history, ability to
22 earn, and likelihood of future increases in
income;
- 23 3) The probable or expected duration of the
plan;
- 24 4) The accuracy of the plan's statements of the debts,
expenses and percentage of repayment of unsecured debt,
25 and whether any inaccuracies are an attempt to mislead
the court;
- 26 5) The extent of preferential treatment between classes of
creditors;
- 6) The extent to which secured claims are modified;

MEMORANDUM OPINION-4

- 1 7) The type of debt sought to be discharged, and whether
- 2 any such debt is nondischargeable in Chapter 7;
- 3 8) The existence of special circumstances such as
- inordinate medical expenses;
- 4 9) The frequency with which the debtor has sought relief
- under the Bankruptcy Reform Act;
- 5 10) The motivation and sincerity of the debtor in seeking
- Chapter 13 relief;
- 6 11) The burden which the plan's administration would place
- upon the trustee.

7 Warren, 89 Bankr. at 93, citing In re Brock, 47 Bankr. 167, 169
8 (Bankr. S.D. Cal. 1985) (plan which attempted to discharge an
9 embezzlement debt was not filed in good faith -- quoting In re
10 Estus, 695 F.2d 311, 317 (8th Cir. 1982)).

11 While the use of chapter 13 to obtain the discharge of debts
12 otherwise not dischargeable under chapter 7 by itself is not of
13 itself sufficient to prove bad faith, see In re Street, 55 Bankr.
14 763, 764-65 (9th Cir. BAP 1985); In re Slade, 15 Bankr. 910, 911-12
15 (9th Cir. BAP 1981); In re Whitehead, 61 Bankr. 397 (Bankr. D. Or.
16 1986), good faith has been consistently found to be absent "where
17 all the facts lead inexorably to the conclusion that the petition
18 has been filed to avoid, at minimal cost, a[n otherwise]
19 nondischargeable debt." Warren, 89 Bankr. at 94; citing, In re
20 Gregory, 705 F.2d 1118, 1121 n.4 (9th Cir. 1983).

21 This court has no doubt that the debtor is illiterate.
22 However it also believes that Mr. White was less than forthcoming
23 with his testimony. He failed to give explanations to some of the
24 most basic financial questions. Ms. Johnson was the far more
25 credible witness.

26 The court has concluded there is a basis for denial of

1 confirmation under § 1325(a)(3), (a)(4) and (a)(6). First, the
2 debtor testified that he receives a net income of \$110 per week.
3 Contrary to his schedules, therefore, he would have around \$450-500
4 per month before living expenses to fund his plan. His living
5 expenses, as either shown on his schedules or as testified to at
6 trial, are rent \$150, schooling \$50, utilities \$22, food \$200,
7 clothing \$40, laundry \$10, health insurance \$40. This totals \$512.
8 This is not including an amount for alimony the debtor testified
9 his wife was seeking in the dissolution proceedings. Thus the
10 debtor could not comply with the requirement to pay \$103 per month
11 to the Chapter 13 trustee.

12 The plan, as proposed, would not provide Ms. Johnson with
13 property which is not less than the amount that would be paid on
14 her claim if the estate were liquidated under Chapter 7. In Oregon
15 a husband and wife can claim up to \$20,000 as a homestead
16 exemption. A single debtor may claim up to \$15,000. Even assuming
17 that Ms. Johnson never obtained a lien on the debtor's residence
18 because she did not take the appropriate legal steps to do so under
19 state law, as the debtor argues, she is the only unsecured
20 creditor, apart from the State of Washington on a small obligation,
21 that would receive distribution from the estate upon liquidation
22 after payment of the \$5,000 to the secured creditor. Assuming the
23 property is conservatively worth \$35,000, after payment to the
24 secured creditor, allowance for costs of sale and administrative
25 costs of 10%, and allowance for a \$20,000 exemption there would be
26 a potential of \$6,500 to be distributed to Ms. Johnson and the

MEMORANDUM OPINION-6

1 State of Washington. This is more than the approximately \$3,400 to
2 be distributed under the plan to the two unsecured creditors.


3 Finally, this court does not believe that the plan has been
4 proposed in good faith. I believe that the debtor and his wife
5 incorporated the stable business after Ms. Johnson obtained her
6 judgment to attempt to put that asset beyond her reach. I believe
7 that the debtor, although illiterate and thus not in direct charge
8 of taking care of the business paper work, has and continues to
9 have much more control over the day to day operations of the
10 business than he has claimed. I believe that he has considerable
11 knowledge about buying, training and showing horses. As a result
12 of these skills he has had the primary responsibility for the day
13 to day operation of the business. It is likely that the wife, for
14 the reasons stated above, holds all the corporate stock in her own
15 name. Despite that, considering the couple has a long term
16 marriage and considering Mr. White's long term position at the
17 stables as the key man the state court may find that he is entitled
18 to part of the business as a property settlement.

19 This court has not been shown any financial emergency which
20 forced this debtor into bankruptcy. When Ms. Johnson filed a § 523
21 action against the debtor he immediately converted his Chapter 7
22 case to a Chapter 13 case. These circumstances convince me that
23 the only reason the debtor filed bankruptcy was to attempt to get a
24 discharge of Ms. Johnson's obligation while paying little or
25 nothing on it. Although Ms. Johnson's attorney filed her § 523
26 action under (a)(2), it appears from the facts at trial that she

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1 may have at least had a successful § 523 action under (a)(6) for
2 assault and battery or intentional infliction of emotional
3 distress. She received punitive damage awards for those counts
4 which suggests the jury found the acts to be egregious. Taking all
5 these facts into account this court concludes that this Chapter 13
6 was not proposed in good faith but simply to manipulate the
7 statute.

8 The debtor further argues that the proposed plan represents
9 his best efforts at a sincere attempt to pay off his debts.
10 However, "the good faith requirement under 11 U.S.C. § 1325(a)(3)
11 is separate and distinct from the best effort requirement of 11
12 U.S.C. § 1325(b)(1)(B)." Warren, 89 Bankr. at 95. Based on the
13 foregoing, Ms. Johnson's objections to confirmation of the plan
14 must be sustained. An order consistent herewith shall be entered.

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17 POLLY S. HIGDON
18 Bankruptcy Judge

19 cc: Deb(s); Deb(s) Atty.; Tr.; E. Hill; J. Jagger
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